Supreme Court, U.S.
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No. 96-

# IN THE
# Supreme Court of the United States
## October Term, 1996

*In re* LOUIS F. ALLEN, *et al.*, *Petitioners*

**Petition for a Writ of Mandamus [redacted] to the United States Court of Appeals for the Fourth Circuit and The Honorable Paul V. Niemeyer, M. Blane Michael and Diana Gribbon Motz, Circuit Judges**

## PETITION FOR A WRIT OF MANDAMUS [redacted]

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December 10, 1996

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## QUESTION PRESENTED

Is it a usurpation of judicial power prohibited by due process and by the Federal Rules of Appellate Procedure for a court of appeals, using expedited procedures to hear an emergency motion to stay a preliminary injunction pending appeal, to go beyond the issues presented by that motion, to make dispositive findings of fact, to reach ultimate conclusions on the merits and to direct the dismissal of a complaint that involved important questions about the extraterritorial reach of the disclosure obligations imposed by the federal securities laws and the effect of the anti-waiver provisions of those laws on the enforcement of forum selection and choice of law agreements required by a private foreign enterprise from thousands of U.S. investors, when the appellate court so acted (a) *sua sponte* and without any notice to the parties that it considered itself empowered to do so; (b) without access to or review of the record relied upon by the district court; (c) without confining itself even to the merits of the only appealable order from which an appeal had been noticed; and (d) without following any of the procedures established by the Federal Rules of Appellate Procedure to insure that the merits of appeals are decided on the basis of a complete record, full briefing of all relevant issues, and adequate time for review, deliberation and decision by the appellate court?

## LIST OF PARTIES

The following parties were plaintiffs below and are Petitioners before this Court:

Louis F. Allen; Carl K. Baker; Joyce P. Baker; Peter D. Berrington; Oliver Birckhead; Florence Blaustein, Mary L. Bray; T.K. Brooker; Donald J. Brooks; Joseph Callaghan; James Cassel; Terry G. Chapman; J.A. Clawson; John K. Colvin; Fred B. Cox; John Rawlyn Charles Crabtree; Christopher P. Culp; Gordon C. Davidson; Rutherford Day; Donald D. Doty; M.D.A. Emblin; Audrey Fisher; Donald B. Gimbel; Kenneth J. Gimbel; Katherine Gooch; B.G. Harrison; Yumiko Honda; Herbert W. Hoover, III; Margaret W. Jones; Donald K. Kent; E.R. Kinnebrew, III; Walter J. Levy; Roland Ley; Suzanne Rhulen Loughlin; George C. Lyman, Jr.; Charles P. Lyon; Michael L. McDermott; Robert T. McInerny; Arthur G. Michels; Walter P. Muskat; Walter W. Muskat; A.D. Pistilli; Robert A. Posner; Judson P. Reis; Harry W. Rhulen; Walter A. Rhulen; J.O. Ricke; E. Joy Rose; Mark S. Rose; A.F. Smith; Owen B. Tabor; Allen M. Taylor; Trude C. Taylor; Karl Aronson; Joan R. Farrow; Jonathan M. Farrow; Joan R. Farrow for the Estate of Jesse M. Farrow; Jack Fleck; Marilyn Franckx; Isabel L. Gallagher; Jennifer A. Gallagher; Mary Claire Gallagher; Robert E. Gallagher; Robert E. Gallagher, Jr.; Thomas J. Gallagher; Thomas H. Green; Henry G. Hager; Thornton Hutchins; Vince A. Konen; C.C. Lucas; Herbert A. Middendorff; Robert S. Denebeim; Dana Fisher, Sr.; William Alexander Florence; Anne M. Gallagher; J. Patrick Gallagher; Mark E. Gallagher; Mary Claire Gallagher as Executrix for John P. Gallagher; Katherine Gallagher Goese; Allen S. Green; Robert W. Hatch; Mary Claire G. Johnson; Thomas V. Leeds; Guy A. Main; Eugene F. Middlekamp; Michael Montana; Barbara H. Pisani; Richard B. Sanders; Jack R. Taylor; Ken Noack; Robert L. Pisani; Larry D. Stroup; and Neville G. Williams.

The following parties were defendants below and are Respondents before this Court:

Lloyd's of London, an unincorporated association; Corporation of Lloyd's, a/k/a Society and Council of Lloyd's; Council of Lloyd's

The following parties appeared as *amicus curiae* in the district court:

Government of the United Kingdom of Great Britain and Northern Ireland; Securities and Exchange Commission; California Insurance Commissioner; American Names Association, Inc.; Louisiana Commissioner of Insurance

The following parties appeared as *amicus curiae* in the court of appeals:

Association of Lloyd's Members; Government of the United Kingdom of Great Britain and Northern Ireland; National Association of Insurance Brokers; California Insurance Commissioner

Equitas Holdings Limited; Equitas Reinsurance Limited; and Equitas Limited, a/k/a Equitas or Equitas Group were originally named as defendants but were dismissed voluntarily from the case by plaintiffs and were not parties at the time of the rulings for which review is sought.

The members of the panel of the Untied States Court of Appeals for the Fourth Circuit to whom Petitioners seek a writ of mandamus from this Court are the Honorable Paul V. Niemeyer, M. Blane Michael and Diana Gribbon Motz, Circuit Judges.

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Having agreed to hear an expedited basis Lloyd's extraordinary motion for a stay of a preliminary injunction granted four days previously, at the conclusion of the hearing the Fourth Circuit Court of Appeals acted *sua sponte* and without any prior notice to dismiss entirely Petitioners' claims under the federal securities laws and thereby exceeded its jurisdiction; failed to follow the limitations imposed on its appellate powers by the Federal Rules of Appellate Procedure and the due process clause of the Fifth Amendment; made dispositive findings of fact without any transmitted

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factual record at a time when the record below was not yet complete, thereby preventing Petitioners from presenting their entire case as guaranted by due process; and, in the context of such a radically foreshortened *ad hoc* procedure, nevertheless decided important and previously unresolved issues about the extraterritorial reach of the disclosure obligations un U.S. securities laws and the application of the anti-waiver provisions in those laws to forum selection and choice of law clauses in contracts between Americans and private international business entities; thereby unlawfully usurping judicial power in a manner calling upon this Court to grant a writ of mandamus [redacted] [redacted], as the only court with authority to supervise and correct the action of a court of appeal... 12-13

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## PETITION FOR A WRIT OF MANDAMUS

Petitioners Louis F. Allen and other investors in Lloyd's of London, plaintiffs below ("Petitioners"), respectfully pray that a writ of mandamus [redacted] issue to review the order announced from the bench by the United States Court of Appeals for the Fourth Circuit on August 27, 1996, which was explained by a published opinion from that court filed September 3, 1996. Only this Court has power to supervise the actions of a United States court of appeals and compel it to follow procedures required by the Constitution, the statutes defining the jurisdiction of courts of appeal and the Federal Rules of Appellate Procedure.

## OPINIONS BELOW

The decision of the Court of Appeals for the Fourth Circuit is published at 94 F.3d 923 and is reprinted in the accompanying separate Appendix ("App.") to this petition at App., pp. 1a-15a. The unpublished order of that court denying Petitioners' Motion for Reconsideration or, In the Alternative, Rehearing *En Banc*, is reprinted at App., pp. 147a-149a. The unpublished order of that court denying Petitioners' Motion for Stay of Mandate is reprinted at App., pp. 150a-152a. The unpublished order of the United States District Court for the Eastern District of Virginia (Payne, J.), denying Respondents' motion to dismiss and granting Petitioners' motion for preliminary injunction, is reprinted at App., p. 16a. The preliminary injunction order of that court is reprinted at App., pp. 17a-21a. That court's Memorandum Opinion in support of the foregoing orders is reprinted at App., pp. 22a-146a.

## JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1651(a), which authorizes this Court to issue a writ of mandamus when necessary to prevent an appellate court from usurping powers not granted to it, and [redacted]

[redacted] of appeals. The Fourth Circuit's decision in this case was rendered orally on August 27, 1996 and confirmed in a published opinion dated September 3, 1996 that reversed the judgment of the district court granting a preliminary injunction and denying a motion to dismiss, with directions to the district court to dismiss the Petitioners' complaint. Petitioners filed an Emergency Motion for Reconsideration or, In the Alternative, Suggestion for Rehearing *En Banc* on August 30, 1996, which was denied by the Fourth Circuit on September 11, 1996.

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Federal Rule of Appellate Procedure 3(c) provides that:

> A notice of appeal must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal. An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X." A notice of appeal filed pro

> se is filed on behalf of the party signing the notice and the spouse and minor children, if they are parties, unless the notice of appeal indicates a contrary intent. In a class action, whether or not the class has been certified, it sufficient for the notice to name one person qualified to bring the appeal as representative of the class. A notice of appeal also must designate the judgment, order, or part thereof appealed from, and must name the court to which the appeal is taken. An appeal will not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice. Form 1 in the Appendix of Form is a suggested form for a notice of appeal.

Petitioners' causes of action in the district court were based upon the anti-fraud and proxy disclosure requirements contained in §§ 10(b) and 14(a), respectively, of the Securities Exchange Act of 1934, 15 U.S.C. §§ 78j(b) and 78n(a), which provide as follows:

§ 10(b):

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange —
>
> . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

§ 14(a):

> It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 78l of this title.

The anti-waiver provision of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc(a), provides that:

> (a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void.

## STATEMENT OF THE CASE

### Initial Proceedings

Petitioners are citizens of the United States who were solicited in this country at various times from the 1950s through the 1980s by representatives of Lloyd's to become investors at Lloyd's. Lloyd's refers to its investors as "Names." Respondents are Lloyd's of London, an unincorporated association, Corporation of Lloyd's, a/k/a Society and Council of Lloyd's and Council of Lloyd's (collectively "Lloyd's"), defendants below, and the Circuit Judges to whom mandamus is sought.

Names provide Lloyd's with capital to underwrite Lloyd's insurance policies. Names make no underwriting decisions about who will be insured, the premiums to be charged or how

insurance claims will be handled. Names also make no decisions about how premiums paid by policyholders in whose risk they participate are invested. Instead, insurance and investment professionals involved in managing the various insurance syndicates that issue Lloyd's policies are responsible for all of these decisions.

Petitioners filed this action on June 28, 1996 in the Eastern District of Virginia. In their complaint, as amended ("First Amended Complaint"), Petitioners sought pursuant to § 14(a) of the Securities Exchange Act of 1934 ("the 1934 Act"), 15 U.S.C. § 78n(a), and the regulations promulgated by the Securities and Exchange Commission ("SEC") pursuant to that statute, 17 C.F.R.§§240.14a-3 and -9, to compel Lloyd's to disclose more financial information about a $22 billion restructuring plan called the "Plan for Reconstruction and Renewal" (the "R&R Plan") first announced generally by Lloyd's in 1995.[1] Among other things, the R&R Plan converted the existing investment of Names in particular syndicates that underwrote Lloyd's insurance policies into the capitalization for a new reinsurance company formed by Lloyd's known as Equitas Reinsurance Ltd. ("Equitas"). The R&R Plan included an offer by Lloyd's for itself and others, including managing agents of Lloyd's syndicates, solicitors, insurance brokers and accountants, whereby all disputes between or among them, including existing and potential lawsuits by Names worldwide, would be settled for a total of $4.8 billion. Lloyd's solicited Names to accept their individual shares of the settlement offer and informed Names worldwide that the plan could not be implemented unless most of the Names accepted.

[1]Petitioners also alleged that Lloyd's had violated § 10(b) of the 1934 Act, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240.10b-5, by making material misrepresentations or omissions in the information that was supplied to Names about the R&R Plan. Petitioners later filed a motion for leave to file a supplemental Second Amended Complaint that added two new counts alleging additional substantive violations of other provisions of the 1934 Act. These amendments were not considered by the courts below and are not at issue here. *See* Mem. Op., App., pp. 23a-24a.

On July 19, 1996, Petitioners filed a motion for a preliminary injunction to compel disclosures required by SEC regulations, to enforce § 14(a) and to prohibit Lloyd's from forcing them and other American Names to make irrevocable elections about the R&R Plan prior to Lloyd's compliance with the applicable disclosure requirements.

Lloyd's responded to the Petitioners' complaint on July 26, 1996 by filing a motion pursuant to Fed. R. Civ. P. 12(b)(3) to dismiss their claims on the grounds that venue was inappropriate. Lloyd's contended that a standard Lloyd's General Undertaking form agreement in force since 1987 that existing Names were asked to sign in 1986 provided that all disputes between a Name and Lloyd's must be brought only in courts in the United Kingdom and decided pursuant to the laws of that country.[2] Lloyd's also argued that venue was inappropriate pursuant to the doctrine of forum *non conveniens*. Reserving its position that the transactions at issue did not involve securities within the meaning of the federal securities laws, Lloyd's expressly disclaimed reliance on that argument as a basis for granting its motion to dismiss: "These improper venue and forum *non conveniens* issues are dispositive of all claims in this action regardless of whether the federal securities laws have any application." Memorandum of Law in Support of Lloyd's Motion to Dismiss the First Amended Complaint, p. 4 n.3.

The parties submitted extensive briefs, affidavits and evidentiary materials to the district court relating to the preliminary injunction prior to an evidentiary hearing. At the invitation of the district court, the SEC appeared as *amicus curiae* and submitted a brief supporting Petitioners' position that Lloyd's forum selection and choice of law clauses should not be enforced because they violated the anti-waiver provisions of the 1934 Act, 15 U.S.C. § 78cc(a), and offend the public policy embodied in the securities laws.

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[2]On the record before the appellate court, only one of Petitioners had acknowledged signing this new version of the General Undertaking.

On Friday evening, August 23, 1996, Judge Robert E. Payne granted Petitioners' motion for a preliminary injunction, directed Lloyd's to make disclosures required by § 14(a) and applicable SEC regulations by September 23, 1996, prohibited Lloyd's from taking steps to collect any amounts from American Names pending completion of the disclosure and review process, established bond and other requirements to protect Lloyd's from injury pending the trial, ordered the parties to confer about a discovery schedule, and set a November 4, 1996 trial date. The district court also issued a separate order that denied Lloyd's motion to dismiss the First Amended Complaint. These orders were supported with a lengthy Memorandum Opinion that extensively reviewed the evidence of record and the legal arguments of the parties.

Moments after Judge Payne released his opinion and orders to the parties, Lloyd's filed a notice of appeal. *See* App., pp. 153a-156a. The appeal was taken solely from the order granting the preliminary injunction. Even before Judge Payne had ruled or Lloyd's had filed any motions or other papers with the Fourth Circuit, Lloyd's made *ex parte* arrangements through the office of the clerk of the Fourth Circuit to receive extraordinary expedited consideration of a motion to stay any preliminary injunction that might be entered by the district court. Lloyd's was directed to file its motion to stay by noon on Sunday, August 25; Petitioners were to respond by 5:00 p.m. on Monday, August 26; and a panel would hear the motion on Tuesday, August 27, at 9:30 a.m. Petitioners were given no opportunity to participate in these communications or to dissuade the Fourth Circuit from approaching the case in such an unnecessarily hasty manner.

On Sunday, Lloyd's filed a "Motion for Stay Pending Appeal" pursuant to Fed. R. App. P. 8(a) and Fourth Circuit Rule 8 to suspend the effect of the preliminary injunction, arguing that the court below had misapplied the Fourth Circuit standards for a preliminary injunction. In that context, Lloyd's argued that Petitioners were unlikely to succeed on the merits

because, *inter alia*, the district court had erred in deciding that the forum selection clause did not require dismissal of Petitioners' claims.

Lloyd's never requested expedited consideration of the merits of its appeal; rather, Lloyd's argued that it needed a stay of the preliminary injunction because of the purported harm to Lloyd's if it could not proceed with its August 28 deadline for acceptances of the R&R Plan. At no time before or during the hearing in the Fourth Circuit did Lloyd's request any relief other than a stay. The court of appeals never suggested that it was considering relief other than a stay. No order was ever entered by the court of appeals that altered or modified the normal merits briefing deadlines or other requirements of the Federal Rules of Appellate Procedure. Petitioners had no notice whatsoever that the appellate court considered itself authorized to consider the unappealed denial of Lloyd's motion to dismiss, or to decide the entire appeal.

Petitioners submitted their brief in opposition to Lloyd's motion to stay by 5:00 p.m. on Monday, August 26. Both Lloyd's and Petitioners submitted excerpts from the affidavits and other evidentiary materials presented to the district court in connection with the preliminary injunction hearing. Lloyd's never arranged to transmit the record from the court below, as required in an appeal by Fed. R. App. P. 10 and 11. The Fourth Circuit never had access to the entire record developed in the district court.

The panel heard oral argument as scheduled at 9:30 a.m. on Tuesday, August 27. At the outset of oral argument, the presiding judge informed the parties that the panel had reviewed all of the parties' appellate filings, except for certain evidentiary materials submitted by Petitioners. The panel stated that it intended to allow extended oral argument, retire for a luncheon recess and announce its decision at 2:00 p.m.

When the panel returned from its recess after the conclu-

sion of oral argument as scheduled, the following order was announced from the bench:

> On motion of appellants to stay the district court's injunction entered August 23, 1996, and upon a consideration of the briefs, papers, and extensive arguments of counsel, the Court grants the motion. Because the Court's decision rests on its determination, to be articulated in a later opinion, that the contractual provisions among the parties selecting the law of and a forum in the United Kingdom should be enforced, we reverse and remand this case with instructions that the district court dismiss it.

This order was the first indication from the panel that dismissal of the case was at issue.

Lloyd's has subsequently maintained that this mandate requires the dismissal of all claims, even as to Petitioners who had never signed any agreement with Lloyd's containing the choice clauses at issue.

## The Decision Below

The panel's later opinion explained that this Court's decision in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), and subsequent cases require that choice of forum and law provisions be enforced unless, among other things, enforcing the choice of law provision would contravene a strong public policy of the forum state. The district court had concluded that U.S. public policy requiring certain disclosures to investors, as confirmed by the anti-waiver provisions contained in the federal securities laws, would be subverted by enforcement of the choice clauses in this case, in which Petitioners primarily sought to compel disclosures that are required pursuant to SEC regulations that implement § 14(a) of the 1934 Act. Petitioners sought these disclosures so that they could make an informed decision whether to accept or reject Lloyd's R&R Plan offers.

The panel's opinion in this case is the first time a court of appeals has considered the anti-waiver provision in the context of the prophylactic disclosure obligations created by § 14(a) and applicable SEC regulations. As to disclosure, the panel concluded that, "[W]e do not believe that Congress intended that the *disclosure* requirements of the United States securities law be exported and imposed as governing principles on markets conducted entirely in other countries simply because membership in such markets is solicited in the United States." 94 F.3d at 929 (emphasis in the original), despite the evidence in the record developed for the preliminary injunction of Lloyd's extensive involvement in disseminating offering materials and raising capital throughout the United States. The panel also held that a failure to enforce the choice clauses would "violate the most fundamental precepts of international comity" because "[i]mposing United States securities laws on this foreign market would directly contravene the very rules and regulations adopted in Britain for the creation and operation of the Lloyd's market to which the Names subscribed." *Id.* at 930. However, the panel opinion cited no rule or regulation adopted in Britain that forbade Lloyd's from making the disclosures required by the U.S. laws, nor is there any record evidence of such a provision.

The panel also suggested that significant interests in the U.S. and foreign countries would be adversely affected if Lloyd's were required to comply with the U.S. disclosure requirements in connection with their solicitation of U.S. citizens to become Names.[3] At the same time, the court left undisturbed the portions of the district court's decision concluding that the initial investments made by Names in Lloyd's

[3]The panel apparently relied on representations made in briefs submitted by *amici curiae* that filed motions on August 26 for leave to submit briefs. The panel orally granted these motions at the argument on Lloyd's motion to stay on August 27. Petitioners had no opportunity to object to these motions, as permitted by Fed. R. App. P. 27(a) and 29, or to respond fully to the substance of arguments or representations of fact in the briefs that were not supported by record evidence in this case.

were likely, on the ultimate merits of the case, to be deemed to be an investment in a security. *Id.* The panel failed even to mention the position of the SEC as *amicus curiae* in the district court that enforcement of the forum selection and choice of law clauses with respect to Petitioners' claims would contravene the anti-waiver provisions of the federal securities laws and the important public policies expressed in those laws.

As to fraud, the panel followed the decisions of other courts of appeal[4] that have concluded that the availability of parallel damages remedies under British law sufficed to implement the purpose of the anti-fraud provisions of the federal securities laws. 94 F.3d at 929. The panel did not express any concern that English causes of action are more narrowly circumscribed, or the remedies more limited, than those available under U.S. law, either to deter fraud in the future or to redress the harm done to victims of fraud in connection with the purchase and sale of securities, or that the anti-waiver provisions contained in the securities laws directly forbid the enforcement of a choice clause that sends a claimant to a forum that will not enforce the subtantive provisions of U.S. securities laws. In contrast, Judge Payne's opinion thoroughly reviewed these issues, generally (*see* Mem. Op., App., pp. 66-71a) and in the context of the R&R Plan, which contained a specific waiver of any disclosure duty, as well as waivers of virtually all the theoretical causes of action under British law mentioned by the panel.[5] *Id.*, pp. 45a-46a. Based on his review of the

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[4]*Shell v. R.W. Sturge Ltd.*, 55 F.3d 1227 (6th Cir. 1995); *Bonny v. Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993), *cert. denied*, 510 U.S. 1113 (1994); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353 (2d Cir.), *cert. denied*, 510 U.S. 945 (1993); *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953 (10th Cir.), *cert. denied*, 506 U.S. 1021 (1992).

[5]Because British courts will not apply U.S. statutory laws, *see Roby v. Corporation of Lloyd's*, 996 F.2d 1353, 1362 (2d Cir.), *cert. denied*, 510 U.S. 945 (1993), and the district court's opinion, Mem. Op., App., pp. 59a, the anti-waiver provision would not nullify these provisions.

facts, as well as the law, Judge Payne found that the anti-waiver provisions in the securities laws were violated because the choice clauses would leave Petitioners in a foreign forum that would not hear their statutory cause of action. *Id.*, pp. 56a-63a.

Following the announcement of the panel's order, Petitioners filed their Emergency Motion for Reconsideration or, In the Alternative, Suggestion for Rehearing *En Banc* on August 30, 1996. After the September 3 opinion from the panel, Petitioners supplemented their motion on September 9. On September 11, the Motion for Reconsideration or, Alternatively, Rehearing *En Banc,* was denied. Petitioners subsequently moved for a stay of the mandate on September 18, which was denied on September 20.

## REASONS FOR GRANTING THE WRIT

**Having agreed to hear on an expedited basis Lloyd's extraordinary motion for a stay of a preliminary injunction granted four days previously, at the conclusion of the hearing the Fourth Circuit Court of Appeals acted *sua sponte* and without any prior notice to dismiss entirely Petitioners' claims under the federal securities laws and thereby exceeded its jurisdiction; failed to follow the limitations imposed on its appellate powers by the Federal Rules of Appellate Procedure and the due process clause of the Fifth Amendment; made dispositive findings of fact without any transmitted factual record at a time when the record below was not yet complete, thereby preventing Petitioners from presenting their entire case as guaranteed by due process; and, in the context of such a radically foreshortened *ad hoc* procedure, nevertheless decided important and previously unresolved issues about the extraterritorial reach of the disclosure obligations under U.S. securities laws and the application of the anti-waiver provisions in those laws to forum selection and choice of law clauses in contracts between Americans and**

**private international business entities; thereby unlawfully usurping judicial power in a manner calling upon this Court to grant a writ of mandamus [redacted], as the only court with authority to supervise and correct the actions of a court of appeals.**

Only this Court has power to issue writs of mandamus [redacted] to supervise the actions of a court of appeals. The extraordinary *ad hoc* procedures adopted in this case so depart from the Federal Rules of Appellate Procedure, the accepted and usual course of judicial proceedings, and the constitutional requirements of due process as to call for an exercise of this Court's supervisory power. In less than four days, the panel forced Petitioners to proceed from a thoroughly considered preliminary injunction order to an unannounced, full-scale review of the merits of their entire case. This Court's intervention and assistance is necessary if the credibility of the appellate process is to be preserved.

It is especially important that those supervisory powers be exercised in this case, because the product of the appellate court's hasty, ill-considered and uninformed deliberations is a decision that addresses important, previously undecided issues arising under the federal securities laws. The precedential impact of the decision may reach far beyond the parties to this case and affect future decisions, not only with respect to the fundamental procedural rights at issue, but in a substantive area of substantial public importance — the extraterritorial reach of the federal disclosure requirements to transactions involving foreign enterprises that conduct much of their underlying business outside the U.S., but obtain substantial amounts of capital from thousands of U.S. investors.

This Court should set aside the panel's order insofar as it purports to dismiss Petitioners' claims and require the Fourth Circuit to conduct a full appeal limited to the issues raised by Lloyd's notice, as required by the Federal Rules of Appellate

Procedure,[6] so that any merits decision on these important issues under the U.S. securities laws will be based on a full evidentiary record; complete briefing and argument to the appellate court of all relevant issues; and reasoned, fully informed deliberations.[7]

## The Flaws in the Fourth Circuit's Procedures

This case had been pending for eight weeks at the time of the preliminary injunction hearing. Because of the pending motion to dismiss, the only limited discovery (three depositions and an exchange of hearing exhibits) was as agreed by the parties for the preliminary injunction hearing. The limited record was one typical of the preliminary injunction phase of a case that itself was still in a very preliminary stage.

Petitioners do not know what Lloyd's told the staff of the Fourth Circuit about the calamities Lloyd's contended would ensue if Lloyd's did not receive expedited consideration in that court. All Petitioners know is that, even before Judge Payne had entered his opinion, Lloyd's had advised the clerk's office that it would seek an emergency hearing of a motion to stay in the event that Judge Payne's decision granted Petitioners any injunctive relief.

In Lloyd's notice of appeal (*see* App., pp. 153a-156a), Lloyd's specifically appealed only from the order granting a preliminary injunction, the only order subject to immediate appeal pursuant

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[6]Petitioners concede that the accelerated process was within the Fourth Circuit's power as long as the decision was limited to the stay issue.

[7]Petitioners sought to enjoin the consummation of the R&R Plan until a reasonable time after Lloyd's had made the disclosures required by § 14(a) and applicable SEC regulations. Although Lloyd's original, self-imposed August 28 deadline for accepting the R&R Plan has passed, Lloyd's has since extended the deadline until February 1997. For Names who made an election about the R&R Plan without the benefit of the required disclosures, rescission and damages are also available remedies for a § 14(a) violation. *See Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970); *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281 (2d Cir. 1973). The appropriate remedy should be left to the trial court upon remand.

to 28 U.S.C. § 1292(a)(1). Fed. R. App. P. 3(c) states that, "A notice of appeal . . . must designate the . . . order, or part thereof, appealed from." This Court has held that the requirements of Fed. R. App. P. 3(c) are jurisdictional. *See Tores v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). Thus, the only issue that was properly before the court of appeals on the merits was the district court's order granting the preliminary injunction.

Consequently, the only issue briefed and before the panel on Tuesday, August 27, was Lloyd's "Emergency Motion to Stay." That motion did not even seek expedited consideration of the merits of Lloyd's appeal from the preliminary injunction order. Without any notice to the parties, either before or during argument, that it intended to do so, the panel in its decision went far beyond the issue of whether to grant or deny such an emergency motion. By reaching out to decide the entire case, the panel abrogated all of the procedural rules intended to assure that an appellate court has before it the complete record on the issues raised by the appeal, that the parties have fully briefed all of those issues, and that the court itself has had adequate time to review the record and the briefs and to deliberate. *See, e.g.*, Fed. R. App. P. 10, 11, 12, 28, 30 and 31. That the panel made such an extraordinary decision in the absence of any trial court record is particularly surprising in light of the many factual findings reflected in the appellate opinion.

This Court has described the limited circumstances under which review may proceed on the ultimate merits of a claim in the context of an appeal from a preliminary injunction:

> [I]f a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts as established are of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction.

*Thornburgh v. American College of Obstetricians and Gyneco-*

*logists*, 476 U.S. 749, 759 (1986). However, as this Court has recognized,

> A different situation is presented, of course, when there is no disagreement as to the law, but the probability of success on the merits depends on facts that are likely to emerge at trial.

*Id.* at 757, n. 8. *See also University of Texas v. Camenisch*, 451 U.S. 390 (1981) (recognizing that it is generally inappropriate for a federal court at the preliminary injunction stage to give a final judgment on the merits).

The panel opinion is replete with explicit and implicit references to critical fact issues, hotly disputed in the district court, about which Petitioners are now denied by the panel their constitutionally guaranteed opportunity to present evidence. For example, the panel held that the Lloyd's market is "conducted entirely" in England, 94 F.3d at 929, whereas Petitioners' evidence below demonstrated that Lloyd's had solicited U.S. investors in this country to provide hundreds of millions of dollars in capital and had processed and paid insurance claims in this country as well. The panel found further that all Petitioners were subject to a forum selection agreement requiring that claims be pursued in England. The evidence, however, established only that one of the Names in this litigation was subject to such a forum selection agreement. As Petitioner Herbert Hoover, III, established in an affidavit filed in the Fourth Circuit, some Names (including Mr. Hoover) had ceased investing in Lloyd's before 1987, the effective date of Lloyd's first forum selection clauses. The panel did not know that at the time of its August 27 decision, yet dismissed each Petitioner's federal securities law claims on the basis of the enforceability of a forum selection clause to which only one of them was proven to have agreed.

Additionally, the panel found that Lloyd's new Equitas reinsurance vehicle was not a "security" subject to the disclosure and anti-fraud requirements of the federal securities laws. Such

a finding clearly required a fact-based analysis of the nature of the investment vehicle, the R&R Plan and Lloyd's solicitation activities related to the R&R Plan. *See* Mem. Op., App., pp. 122a-136a. Whether Petitioners' investment in Lloyd's or in Equitas is an "investment contract" security must be decided under the tests announced in *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946), as amplified by *United Hous. Foundation, Inc. v. Forman*, 421 U.S. 837, 851-52 (1975). The panel could not have conducted such a factual analysis properly or even tested Judge Payne's fact-based preliminary conclusions in the absence of the record required by Fed. R. App. P. 10, 11 and 12. Petitioners also should not have been forever foreclosed from developing further evidence through discovery and presenting that evidence at trial.

By essentially foreclosing not only the usual appellate review process but also further proceedings on these issues in the trial court, the panel revealed a shockingly premature eagerness to reach dispositive fact-based conclusions without any adequate record on those facts. Indeed, as to the evidentiary materials Petitioners had selected to oppose Lloyd's emergency motion to stay from the limited record developed for purposes of the preliminary injunction hearing, the presiding judge conceded at the outset of the oral argument:

> [W]e received on Sunday materials from Lloyd's, which was a large box, and I think we've all had an opportunity to review that, although the exhibits are voluminous, and we may be asking you questions about what is contained in that record, and I don't know if that pretends to be the full record or not. I understand the full record is a large volume of materials. And then on Monday we received materials from the plaintiffs below, the names, and we read those materials. When I say the materials, your memorandum, it was also accompanied by a lot of exhibits, and I don't dare to represent on behalf of everybody here whether we read all of those,

> because I'm not sure of the answer to that, but we have looked through these materials and tried to bring ourselves up to a level of understanding that is possible in that short time.

Transcript, Oral Argument, Court of Appeals for the Fourth Circuit, pp. 2-3.

Similarly, the panel's conclusion that Lloyd's involvement in the United States with American investors was so insignificant that the U.S. laws requiring disclosures need not apply involved fact-based conclusions about what the evidence showed as to the nature and extent of that involvement. Such conclusions could not properly be reached without review of the history and nature of the original transactions; the process by which Names were solicited; the nature and circumstances of the execution of documents, including any agreement containing the choice clauses; the number of American Names; the amount of their investments in the Lloyd's market; and a wide variety of other facts. The gathering of evidence about those matters was not yet complete because virtually no discovery had been conducted. The entire record of the facts that had been presented in the limited context of the preliminary injunction hearing[8] was not even before the panel. As to those selected evidentiary materials

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[8]Had the merits of Lloyd's motion pursuant to Fed. R. Civ. P. 12(b)(3) to dismiss for improper venue based on a forum selection clause properly been before the panel, it should have taken the well pleaded allegations in Petitioners' complaint, assumed their truthfulness and then decided whether the forum selection clause in tandem with the choice of law clause could not be enforced in light of the antiwaiver provisions in the federal securities laws. That was all Lloyd's motion had asked. As Judge Payne's opinion noted, counsel for Lloyd's reaffirmed that position during argument on the motion to dismiss. Mem. Op., App., p. 49a. Applying that standard, the court should have assumed that Petitioners ultimately could support their allegations with facts demonstrating, *inter alia*, that their investments at Lloyd's, including the proposed capitalization of Equitas, were securities under U.S. law and then decided whether any forum and choice of law clauses proven applicable to Petitioners' investments were

*(footnote continued)*

the parties asked the court to consider in the context of Lloyd's motion to stay, the panel conceded at the outset of the August 27 oral argument that it had only had time to conduct a limited review of the evidentiary exhibits selected by Petitioners.

Numerous other examples of inappropriate and unsubstantiated fact-finding forays by the appellate court may be found in the panel's opinion. The opinion recounts a variety of facts underlying its dispositive finding that no part of the R&R Plan could be a security for purposes of the securities laws. *See* 94 F.3d at 930-31.[9] The trial court, which had substantially more time and the complete preliminary injunction record to review, concluded as a preliminary matter that Petitioners would likely be able to prove their contentions. Mem. Op., App., pp. 122a-130a. The panel also made a dispositive conclusion that no consent or authorization had been requested about any aspect of the R&R Plan, other than an individual Name's acceptance of his individual settlement offer. Such a conclusion required (but was not supported by) a thorough understanding of all facts regarding the R&R Plan. The trial court, which had the benefit of the entire record, concluded

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(footnote continued)

enforceable, rather than reaching merits decisions about what the evidence ultimately would prove. Instead, the panel embarked upon the extensive factual analysis described above, essentially finding its own dispositive "facts," notwithstanding the absence of any transmitted record and the preliminary state of the case.

[9]The panel also makes no reference to evidence that, during the months when Lloyd's heavily promoted the merits of the R&R Plan before it delivered the final version to Names in late July, 1996, Lloyd's stated that each participating Name would acquire an equity interest in and opportunity for profit from Equitas. The market may well have been affected by the prior representations. Such promotional materials are relevant in deciding whether a particular investment is an "investment contract" and thus a security within the meaning of the federal securities laws. *See SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 352-53 (1943) (using such evidence to hold that assignments of oil leases were "investment contracts").

to the contrary on these issues. *Id.*, 138a-141a.[10]

Without that record, the panel should not have determined facts itself and foreclosed Petitioners from presenting further proof. The panel should not even have decided whether Judge Payne's preliminary findings of fact were clearly erroneous and substituted its own dispositive findings of fact when it did not have all of the evidence available to review. Had the panel followed the normal appellate process, significant evidence contradicting its conclusions that undoubtedly would have led to a different result would have been reviewed.

The panel's opinion thus clearly reached a number of subsidiary factual issues, resolved them in a manner adverse to Petitioners and directed the district court to dismiss their claims altogether, even though Petitioners had only a limited opportunity for any discovery in the case and had not completed their underlying record at a trial on the merits. The panel did so utterly without warning, notwithstanding that the notice of appeal was confined to the preliminary injunction order itself and that the briefs only addressed Lloyd's motion for a stay, not the ultimate merits of the case.[11]

The reason it is generally inappropriate to render a final judgment based on a factual record developed at the preliminary injunction stage of a case has its origins in the requirement of the Fifth Amendment to the Constitution that persons be afforded due process. At the core of procedural due process is the right to notice and an opportunity to be heard. *See, e.g.*,

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[10] *Inter alia*, there was evidence that Lloyd's told Names that, whether Lloyd's had power to force Names into Equitas, it would *not* implement the R&R Plan unless a sufficient number of Names accepted. *See* Mem. Op., App., pp. 99a and 139a.

[11] Lloyd's argued the strengths and weaknesses of the parties' respective positions on the enforceability of the forum and choice of law provisions in the context of an element required for preliminary relief — that the movant establish a substantial likelihood of success on the merits.

*Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). Fed. R. Civ. P. 65(a)(2) expressly recognizes these requirements by providing that a federal court at a preliminary injunction stage may not order the trial of an action on the merits to be advanced and consolidated with the hearing of an application for preliminary relief unless the parties have received clear and unambiguous notice of the court's intent to consolidate such hearings, either before the hearing commences or at a time which will still afford parties full opportunity to present their respective cases. Because of the limited nature of a preliminary injunction, parties are not required to present their entire case and ordinarily do not, unless they have received such a notice. *See generally University of Texas v. Camenisch*, 451 U.S. at 395-96. Where, as here, a litigant has been deprived of a full opportunity to present its case, that litigant has been denied notice and an opportunity to be heard, in violation of the Fifth Amendment.

When a lower federal court has usurped power in such an extraordinary manner, writs of mandamus or certiorari in this Court provide vehicles through which such departures from the accepted and usual course of judicial proceedings may be corrected. *Cf. Schlagenhauf v. Holder*, 379 U.S. 104, 111-112 (1964); *Los Angeles Brush Manufacturing Corp. v. James*, 272 U.S. 701, 706 (1927) (both using the writs to review claims that lower federal courts had exceeded powers granted them by the Federal Rules of Civil Procedure). Just as this Court has used writs of mandamus [redacted] to supervise the conduct of lower federal courts in interpreting and enforcing their powers under the Federal Rules of Civil Procedure, so this Court should grant such relief in this case to supervise the action of the appellate court in administering the Federal Rules of Appellate Procedure, to confine the jurisdiction of the appellate court on appeal to a review of the orders actually appealed from that are properly appealable under 28 U.S.C. § 1291 or § 1292, and to assure that litigants are not deprived of their constitutional right to notice and an opportunity to be heard before they are denied rights protected by the laws of the United States.

## The Importance of the Issues Improperly Addressed Using These Truncated Procedures

The procedures used by the court of appeals in this case were so far beyond its lawful authority that this Court should use the writ of mandamus [redacted] to control the appellate court's actions, even if the ultimate issues in this case were important only to these parties. In fact, the issues decided by the panel significantly affect the interpretation and enforcement of the federal securities laws. Those statutes implement important federal interests in protecting the millions of U.S. citizens who make investments in securities from fraud and in creating a prophylactic scheme of required disclosures to enable them to make informed investment decisions. The panel's opinion addressed issues about the extraterritorial reach of the disclosure provisions of the federal securities laws, and the interplay between the anti-waiver provisions of those laws and forum selection and choice of law clauses. These issues are important to all U.S. citizens who provide capital to foreign enterprises, as is the proper role of international comity in deciding these issues. The need for this Court to supervise the process by which the decisions are made accordingly is far greater than if only the Petitioners' personal interest in procedural fairness were at stake.

First, the court of appeals decided that the anti-waiver provisions contained in the 1934 Act did not preclude enforcement of forum selection and choice of law clauses that could send U.S. citizens who seek to enforce disclosure rights provided by the federal securities laws to a jurisdiction (such as England) that will not impose *any* disclosure requirements.

Beginning with *The Bremen v. Zapata Off-Shore Oil Co.*, 407 U.S. 1 (1972), this Court has rendered a series of decisions that accord choice of forum provisions presumptive validity, especially in the context of international transactions. *See, e.g., Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 115 S. Ct. 2322 (1995); *Carnival Cruise Lines v. Shute*,

499 U.S. 585 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974). Those same decisions have recognized that choice of forum and law provisions may be found unreasonable if, *inter alia*, their enforcement would contravene a strong public policy of the forum state. *See Carnival Cruise Lines*, 499 U.S. at 595; *The Bremen*, 407 U.S. at 12-13, 15, 18. In *Mitsubishi Motors*, this Court noted that if "the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . ., we would have little hesitation in condemning the agreement as against public policy." 473 U.S. at 637, n.19, quoted favorably in *Vimar*, 115 S. Ct. at 2330.

In this case, Petitioners satisfied the trial court that the choice of forum and choice of law clauses here operate in tandem as a prospective waiver of Petitioners' statutory right to disclosures as a condition of certain securities transactions, including the R&R Plan. As Petitioners demonstrated courts in the United Kingdom will not recognize the statutory law of another jurisdiction as the basis for a claim asserted in that country or otherwise enforce foreign statutory law. To enforce the choice clauses in this case thus means that Petitioners have no forum available to them to hear disclosure claims brought pursuant to the federal securities laws.

As Petitioners and the SEC argued, and the district court agreed, as a matter of congressional command, the anti-waiver provisions applicable to the 1933 Act, 15 U.S.C. § 77n, and to the 1934 Act, 15 U.S.C. § 78cc(a), dictate that any contractual stipulation effectively waiving compliance with the substantive provisions of the securities laws is null and void. *See also Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 229 (1987) (noting that the decision in *Scherk* turned on the circumstances of that case, where selection of arbitration would not affect the claimant's ability to enforce statutory rights). If the foreign forum applying its law will not even consider claims to enforce U.S. securities laws, then the choice

clauses effectively operate as a waiver of compliance. That some remedy other than the prerequisite disclosures may have been available under the chosen law cannot belie that these claimants will not have this unique federal statutory right.

Second, the court reached the unprecedented conclusion that Congress did not intend the U.S. disclosure obligations to reach transactions such as the R&R Plan that have such a significant international involvement, regardless of the number of American investors or the amount of their capital at issue. The panel acknowledged the public policy exception to enforcing choice laws, as well as the significance of the federal policy of full disclosure of relevant information embodied in the United States securities laws that replaced the traditional European doctrine of *caveat emptor*. *See, e.g., SEC v. Capital Gaines Research Bureau, Inc.*, 375 U.S. 180, 186-87 (1963). However, based on its narrow construction of the intended reach of the disclosure requirements, the panel concluded that even if there were *no* disclosure remedies in the United Kingdom, Lloyd's choice clauses should be enforced.[12] The panel summarily reasoned that Congress had not intended that U.S. disclosure requirements "be exported and imposed as governing principles on markets conducted entirely in other countries simply because membership in such markets is solicited in the United States." 94 F.3d at 929.

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[12] Having incorrectly decided to analyze the adequacy of remedies for fraud in the United Kingdom in relation to Petitioners' fraud claim, the panel also erred in assessing the adequacy of those remedies. There are different standards of proof and only a limited damages remedy. *See* Mem. Op., App., pp. 66a-71a. Moreover, without the anti-waiver provisions of the federal laws, Lloyd's also could argue that Names would waive most of the alternative claims supposedly available under British law if they accepted the R&R Plan. *Id.*, App., pp. 45a-46a. Whatever the merits of the panel's assessment of the adequacy of British fraud remedies, that determination is irrelevant to whether federal *disclosure* obligations intended to replace the rule of *caveat emptor*, compliance with which cannot lawfully be waived under the laws of this country, take precedence over the desirability of enforcing choice clauses in international agreements.

This broad and bold statement was premised on a misunderstanding of the facts and a misimpression of the law. The parties' briefs on Lloyd's stay motion do not discuss whether Congress intended that U.S. securities laws have extraterritorial effect in cases such as this. The district court's opinion also does not discuss this issue. Yet, without benefit of any briefs, the panel adopted an unprecedented, narrow reading of the reach of the disclosure obligations imposed by the U.S. securities law.

The panel must have been unaware of the statutes that confirm that Congress *did* intend to provide broad reach to the 1934 Act, even where international transactions are involved. *See* 15 U.S.C.§§ 78l(g)(1) (broadly extending reach of the registration requirements to the full extent of the interstate commerce powers), 78l(g)(2) (providing a mechanism for foreign issuers to apply to the SEC for an exemption),[13] and 78c(a)(17) (defining interstate commerce to include commerce between any state and any foreign country). This evidence of an express, statutory purpose to protect U.S. investors in foreign securities, not only with respect to the prevention of fraud, but also the requirements for disclosure, is overlooked in the panel's opinion.

Perhaps the absence of briefs or argument contributed to the panel's failure to recognize the SEC policies embodied in its regulations governing various disclosure obligations under the 1934 Act. In deciding when a foreign enterprise is subject to disclosure obligations, those regulations focus on such factors as the number of U.S. investors; the size of the foreign issue; and, in some cases, whether the securities were quoted over certain quotation systems. A foreign private issuer of securities (a term broadly defined in

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[13]The record in this case included evidence that the SEC staff repeatedly told Lloyd's that the solicitation of U.S. citizens to invest in Lloyd's was a securities transaction, yet Lloyd's never met the requirements for an exemption from the obligations imposed by the securities laws and regulations. See Mem. Op., App., pp. 103a-104a.

17 C.F.R. § 240.3b-4(c) as any foreign issuer other than a foreign government) is exempt from the registration requirements of § 12(g)(1) if its total assets do not exceed $10 million and its securities are not quoted in an automated inter-dealer quotation system. 17 C.F.R. § 240.12g-1. A foreign private issuer that has fewer than 300 holders of any class of its securities resident in the United States is also exempt from the registration requirements. *See* 17 C.F.R. § 240.12g3-2(a). Only foreign private issuers whose securities are actually registered are exempted from compliance with § 14(a). *See* 17 C.F.R. § 240.3a12-3(a).

The SEC's focus is on the number of U.S. investors and the size of the foreign issuer as the primary tests for whether that issuer should be subject to disclosure requirements. Unlike the Fourth Circuit panel, the SEC does not focus on where the foreign enterprise conducts its underlying business activities or the extent of foreign regulation of its business. The SEC's interpretation, unlike the Fourth Circuit's, is consistent with the legislative history of the 1934 Act. The Senate Committee on Banking and Commerce, for example, noted in its report, "Stock Exchange Practices," that the committee was very concerned about the need to protect U.S. investors who purchase foreign securities, such as foreign bonds, and about the increasing amount of the investments made by U.S. citizens in foreign securities. S. Rep. No. 73-1455 (1934). The panel's opinion does not reflect that concern.

Contrary to the well-recognized principle that courts should give great deference to administrative interpretations when an agency has regulatory authority over matters a court must address, *see, e.g., Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), the court of appeals did not defer to the SEC's regulatory definition of the narrow circumstances under which a foreign issuer of securities is exempt from registration requirements or its position that only private foreign issuers that have registered should be exempt from the disclosure requirements of § 14(a)

and its complementary regulations. Again, the rush to judgment deprived the panel of merits briefing on this issue and apparently left if unaware of the existence of these SEC regulations. Of course, the panel also ignored the SEC's views, as expressed in its *amicus curiae* brief in the district court, that enforcement of the choice clauses in this case contravened the federal anti-waiver provisions.

The record developed at the preliminary injunction stage of the case showed that Lloyd's insiders came to this country, sought out prospective Names and, using the prestige of the centuries-old name, "Lloyd's of London," solicited them to become members of Lloyd's by pledging their entire net worth to the enterprise. Prospective Names completed application forms and financial statements in this country and sent them to Lloyd's in London. Although there was evidence that a prospective Name was required to go through the formality of a brief interview before the ROTA Committee of Lloyd's in London, the material events which resulted in the Name's membership took place in the United States. Names who were already participants in Lloyd's before Lloyd's first included the choice clauses at issue in this case, if they signed the new form of agreement, received it through the mails in the United States, executed it here, and then returned it to Lloyd's, as one of Petitioners' witnesses testified at the preliminary injunction hearing. Thereafter, Lloyd's also used the means and instrumentalities of the United States mail to communicate further with Names in the United States about the annual selection of the Lloyd's syndicates to which Names will be assigned and the performance of their investments and to transmit the R&R Plan to them. Lloyd's also sent its representatives to this country to communicate with American Names about, and to solicit their support for, the R&R Plan. *See* Mem. Op., App., pp. 37a-38a, 140a n.57. Most of this evidence is not mentioned in the panel's opinion. If the panel had reviewed the underlying evidence following the normal appellate rules of procedure, it could not have concluded that "[t]he United

States nexus to the transactions involved in this case is thus incidental and tangential." 94 F.3d at 929.

The involvement of Lloyd's in the United States and with citizens of this country was not a sporadic or isolated incident. Approximately 3,000 Americans, or almost 10% worldwide of all Names, became members of Lloyd's syndicates. Over the years, Americans supplied hundreds of millions, if not billions, of dollars of capital to Lloyd's. The R&R Plan alone sought over $250 million in new capital for Equitas from the American Names. Until the decision of the Fourth Circuit in this case, no other appellate court had concluded that Congress did not intend that the federal securities laws should extend to an international transaction affecting as many U.S. residents or having so extensive ties to this country.[14] Had the issue been briefed on the merits in a proper appeal that adhered to the statutes governing appellate jurisdiction and to the Federal Rules of Appellate Procedure, the panel should have reached a different result in this case.

Third, the Fourth Circuit also opined about the role of international comity in deciding when U.S. securities laws may apply to a foreign enterprise that is heavily regulated in its home country. This issue also was not briefed in the context of Lloyd's motion to stay. Perhpas that is why the panel's opinion overlooked a controlling prrecedent — this Court's decision in *Hartford Fire Ins. v. California Merritt Underwriting*

[14]None of the three appellate decisions cited by the panel, *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972); *Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974 (2d Cir.), *cert. denied*, 423 U.S. 1018 (1975); and *Consolidated Gold Fields, PLC v. Minorco, S.A.*, 871 F.2d 252 (2d Cir. 1989), addresses the issue of whether § 14(a) and applicable SEC regulations, or any other disclosure provision, such as the registration requirements of § 12(g)(1), 15 U.S.C. § 78l(g)(1), applied to the transactions at issue in those cases. At most, these cases include dicta about the possibility that there are some international transactions to which the anti-fraud provisions reach that are not intended to be regulated by some of the disclosure provisions.

*Agency Management Ltd.*, 509 U.S. 764, 798-99 (1993). In that case, in the very context of the Lloyd's market and similar arguments about the fact that Lloyd's was and is a heavily regulated marketplace in the United Kingdom, this Court squarely held that comity is an issue only when there is a direct conflict between the laws of this country and the laws of another jurisdiction that arguably govern the same transaction. *In Hartford Fire Ins.*, various insurance syndicates at Lloyd's sought to insulate themselves from antitrust claims brought by private plaintiffs under the Sherman Act, arguing that comity prohibited application of the law of this country because this would inject our courts into a market regulated by British law. This Court rejected the syndicates' position because British law did not require the syndicates to act in a manner prohibited by the U.S. antitrust laws; thus, there was no conflict between the laws of the two nations and therefore there was no comity issue posed.

No court, including the panel in this case,[15] has identified any law or regulation imposed on the Lloyd's market by British law that forbids Lloyd's from making the types of disclosures required by U.S. securities laws or that authorizes Lloyd's to make material misrepresentations or omissions in its communications to Names about their investments. The only respect in which the application of federal securities laws would "intrude" on the Lloyd's market is that it would require Lloyd's, whenever it chooses to solicit U.S. citizens to invest in syndicates at Lloyd's, to make to those investors the types of disclosures required under U.S. law and to refrain from making any material misstatements or omissions in connection

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[15]The panel concluded that imposing U.S. securities laws on the Lloyd's market "would directly contravene the very rules and regulations adopted in Britain for the creation and operation of the Lloyd's market to which the Names subscribed." 94 F.3d at 930. However, the panel cited no aspect of British law that precluded Lloyd's from making to American investors the types of disclosures required under U.S. securities law or that authorized Lloyd's to make material misrepresentation or omissions.

with the sale of securities to them. Complying with those obligations would not force Lloyd's simultaneously to violate British law.

Because of the truncated procedures used by the court of appeals and the absence of merits briefs that addressed all ultimate issues, the panel in its haste overlooked these relevant statutes, regulations and precedent that should have guided its decision and would have produced a different conclusion.

The important issues that the panel addressed deserve to be resolved on a full evidentiary record, with complete briefing and argument and sufficient time for the appellate court to review the factual record and to understand the legal issues. They should not have been resolved in a truncated proceeding in which relevant evidence and law were never even presented to the appellate court because the issue before the court of appeals was the narrow question of whether it should stay a preliminary injunction. This Court should grant the writ of mandamus [redacted] to ensure that Petitioners are not deprived of their rights by procedures that are outside the appellate court's jurisdictional power and that the important substantive issues in this case receive appropriate consideration in an appeal taken after the record has been completed, rather than decided prematurely in an expedited hearing on an emergency motion to stay a preliminary injunction. Only through such proceedings will Petitioners have notice that the merits of their claim are at issue and be afforded an opportunity to be heard, as required by due process.

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